Amlife Insurance Bhd v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-315–05 OF 2018
AZIZAH NAWAWI, NANTHA BALAN AND MOHAMED ZAINI JJCA
26 MARCH 2024

Revenue Law — Income tax — Chargeable income — Whether insurance company's decision to set off current year losses in shareholders' fund against income from general fund correct in law — Whether decision of Director General of Inland Revenue ('DGIR') to set off insurance company's current year losses in shareholder's fund from aggregate income of appellant's life fund and general fund and impose penalty on additional tax assessed correct — Appeal against decision of DGIR to Special Commissioners of Income Tax ('SCIT') — Whether SCIT erred in ruling insurance company's losses in its shareholders' fund should be set off against life fund only without insurance company's fulfilling requirements under s 43(2)(b) of Income Tax Act ('ITA') — Whether High Court correct in affirming findings of SCIT — Whether income of life fund should be treated as part of insurance company's aggregate income under s 44(2) ITA 1967

The appellant sold general and life insurance before 2009 and confined its business to life insurance under a restructuring exercise in 2009. The appellant had, before the restructuring, transferred RM2,050,325 for the year of assessment ('YA') 2003 and RM5m for the YA 2004 from its shareholders' fund to its life fund to ensure that the latter was sufficiently solvent to meet its liabilities to policyholders. Arising from these transfers, the appellant's shareholders' fund suffered losses of RM1,741,492 for YA 2003 and RM4,799,307 for YA 2004. To address these losses, the appellant set off the losses from the surplus income of its general fund. The appellant's method, however, did not find favour with the respondent when it audited the appellant in 2008. The respondent took the position that the appellant should have offset the losses in its shareholders fund against the income of both the general and life fund combined and not just from the general fund. The respondent then set off the appellant's shareholders' fund's current year losses from the combined income of the general fund and life fund and apportioned the income back to the respective funds. The chargeable income from the appellant's shareholders' fund, general fund and other sources of income were subjected to the standard tax rate of 28%. In contrast, the chargeable income from the life fund was subjected to a concessionary tax rate of 8%. The respondent then issued notices of additional assessment for YA 2003 to 2005 with penalties under s 113(2) of the Income Tax Act 1967 ('the ITA'). Dissatisfied, with the respondent's decision, the appellant appealed to the SCIT. The SCIT took the view that life insurance and general insurance were

separate businesses with their own source of income and that the concept of a shareholders fund was only found in the life insurance business. The SCIT concluded that the appellant's losses from the shareholders' fund should, therefore, be set off against the life fund as both funds came under the Life Insurance business, and that the general fund came under a separate category of general insurance business. As for the penalty imposed, it was set aside by the SCIT as the respondent did not make the correct computation. Again, being dissatisfied, the appellant appealed to the High Court against the SCIT's decision. The High Court concurred with the SCIT's decision that the appellant's losses from the shareholders' fund should only be set off against the life fund and not the general fund, in consonant with s 60(2) of the ITA. Both the SCIT and High Court took the position that the life fund and the shareholders' fund were part of the same business, namely the life insurance business and that the general fund was a separate business coming under the general insurance business. Hence, the present appeal. The issue that arose for determination were whether the income of the life fund should be treated as part of the appellant's aggregate income under s 44(2) of the ITA, as that was the fulcrum of the SCIT's findings that the High Court concurred with.

Held, allowing the appeal with costs:

(1) There was a separate method under the ITA to calculate the income of a life fund, for the income was accorded a concessionary tax rate of 8%. The calculation method for the taxable income of life funds came under s 60AB and 60(3) of the ITA and not ss 5, 43 and 44. Under the principle of *generallibus specialia derogant*, where there were two provisions of written law in which one was general and the other specific, the specific provision overrode or excluded the application of the general provision. Hence, the High Court fell into error in agreeing with the SCIT as it would result in the life fund's income being aggregated with the other Funds and, therefore, not being able to take advantage of the concessionary tax rate of 8%. Also, the High Court misdirected itself in law when it failed to recognise that the income of a life fund must be expressly separated from the income of the other funds to enjoy the preferential tax rate. Therefore, s 44(2) of the ITA should not be relied on to set off the losses from the shareholders' fund against the life fund, for the latter was not part of the appellant's aggregate income (see paras 32–33).

(2) The aggregated income of the general and shareholders' fund should be subjected to the regular tax rate of 28%. Therefore, it was right for the appellant to aggregate and set off the Shareholders Fund's losses against the general fund under the provisions of ss 43 and 44(2) of the ITA. Although the High Court agreed with the SCIT that the appellant's losses could be deducted from its aggregate income, it fell into error by concluding that the income from the shareholders fund could not be

aggregated with the general fund. The life fund could not be part of the aggregate income. The High Court, in agreeing with the SCIT's decision, erred when it failed to consider the purpose and implications of ss 60AB and 60(3) of the ITA. These two sections were enacted to give a preferential tax rate on the income of a life fund, which bore repeating at a concessionary rate of 8% as opposed to 28% on the income of the other funds. A separate tax treatment was created for life funds under the ITA, consistent with the statutory segregation of life funds from the insurance companies' assets under the Insurance Act 1996 ('the IA') (see paras 36 & 38).

(3) Under reg 12 of the Insurance Regulation 1996 ('the IR'), the insurer shall make good any deficit in the life fund by transferring any amount from its shareholders' fund. Any surplus of assets over liabilities of a life insurance fund, however, could only be allocated by way of bonus to participating policies or transferred to the shareholders' fund upon an actuarial valuation and recommendation of the appointed actuary. The appellant could not transfer any surplus funds from its life fund to its shareholders' fund unless it had obtained the appointed actuary's recommendation as set out under s 43(2) of the IA, as the funds were deemed to be held on trust for the policyholders and did not belong to the appellant (see paras 41–42).

(4) The income from a life fund was treated differently from the incomes of an insurer's other funds, as the conditions for the appellant to withdraw any surplus from its general funds and transfer it to its shareholders' fund were less stringent than those for any withdrawal from its life fund. The funds in the appellant's life fund did not belong to the appellant until and unless the stringent requirements under s 43(2)(b) of the IA were met, which in the appellant's case were not. The funds in the life fund remained there for the benefit of the policyholders and could not be deemed to be the appellant's income. It was, therefore, erroneous for the SCIT to rule that the appellant's losses in its Shareholders' Fund should be set off against the life fund only without the appellant fulfilling the strict requirements under s 43(2)(b) of the IA. The High Court committed a fundamental error of law in agreeing with the SCIT on this issue and concluding that the appellant would not be disregarding the provisions of the IA by complying with the provisions of the ITA (see paras 43–45).

(5) The High Court misdirected itself in law by holding that the appellant's responsibilities under the IA should not come into consideration and that it should only be concerned with the ITA on taxation matters (para 59(b) of the judgment). It failed to consider that the appellant would be committing an offence under the IA 1996 and liable to be fined or face imprisonment. The ITA and IA must be read harmoniously and

interpreted purposively based on the purposes for which they were created. Parliament could not have intended insurers to treat the income from their life funds as their own, particularly when the income was only subjected to the concessionary tax rate of 8%. The underlying intention was to encourage insurance companies to reduce the premium for life insurance for the benefit of policyholders; hence, strict regulatory measures were put in place for the income of life funds (see para 48).

(6) The High Court was plainly wrong when it failed to find that the SCIT had misdirected itself in law in interpreting the ITA and IA. The High Court also fell into error by agreeing with the SCIT's stand that the appellant's responsibilities under the IA were not material and that the appellant's losses should be set off against the appellant's life funds only to arrive at its chargeable income (see para 53).

[Bahasa Malaysia summary

Perayu menjual insurans am dan hayat sebelum 2009 dan mengehadkan perniagaannya kepada insurans hayat di bawah proses penstrukturan semula pada 2009. Perayu telah, sebelum penstrukturan semula, memindahkan RM2,050,325 untuk tahun taksiran ('TT') 2003 dan RM5 juta untuk TT 2004 daripada dana pemegang sahamnya kepada dana hayatnya untuk memastikan bahawa dana tersebut cukup solven untuk memenuhi liabilitinya kepada pemegang polisi. Berbangkit daripada pemindahan ini, pemegang saham perayu mengalami kerugian sebanyak RM1,741,492 untuk TT 2003 dan RM4,799,307 untuk TT 2004. Untuk menangani kerugian ini, perayu menolak kerugian daripada lebihan pendapatan kumpulan wang amnya. Kaedah perayu, bagaimanapun, tidak berpihak kepada responden apabila ia mengaudit perayu pada tahun 2008. Responden mengambil pendirian bahawa perayu sepatutnya mengimbangi kerugian dalam dana pemegang sahamnya terhadap pendapatan kedua-dua dana am dan dana hayat digabungkan dan bukan sahaja dari dana am. Responden kemudiannya menolak kerugian tahun semasa dana pemegang saham perayu daripada pendapatan gabungan dana am dan dana hayat dan membahagikan kembali pendapatan kepada dana masing-masing. Pendapatan bercukai daripada dana pemegang saham perayu, dana am dan sumber pendapatan lain adalah tertakluk kepada kadar cukai biasa 28%. Sebaliknya, pendapatan bercukai daripada dana hayat tertakluk kepada kadar cukai konsesi sebanyak 8%. Responden kemudiannya mengeluarkan notis taksiran tambahan bagi YA 2003 hingga 2005 dengan penalti di bawah s 113(2) Akta Cukai Pendapatan 1967 ('ACP'). Tidak berpuas hati, dengan keputusan responden, perayu merayu kepada SCIT. SCIT berpandangan bahawa insurans hayat dan insurans am adalah perniagaan berasingan dengan sumber pendapatan mereka sendiri dan konsep dana pemegang saham hanya terdapat dalam perniagaan insurans hayat. SCIT membuat kesimpulan bahawa kerugian perayu daripada dana pemegang saham, oleh itu, harus ditolak dengan dana hayat kerana kedua-dua dana

berada di bawah perniagaan Insurans Hayat, dan dana am berada di bawah kategori perniagaan insurans am yang berasingan. Bagi penalti yang dikenakan, ia telah diketepikan oleh SCIT kerana responden tidak membuat pengiraan yang betul. Sekali lagi, kerana tidak berpuas hati, perayu merayu kepada Mahkamah Tinggi terhadap keputusan SCIT. Mahkamah Tinggi bersetuju dengan keputusan SCIT bahawa kerugian perayu daripada dana pemegang saham hendaklah hanya ditolak dengan dana hayat dan bukannya dana am, selaras dengan s 60(2) ACP. Kedua-dua SCIT dan Mahkamah Tinggi mengambil pendirian bahawa dana hayat dan dana pemegang saham adalah sebahagian daripada perniagaan yang sama, iaitu Perniagaan Insurans Hayat dan bahawa dana am adalah perniagaan berasingan yang terletak di bawah perniagaan insurans am. Oleh itu, rayuan semasa. Isu yang timbul untuk penentuan adalah sama ada pendapatan dana hayat perlu dianggap sebagai sebahagian daripada pendapatan agregat perayu di bawah s 44(2) ACP, kerana itu merupakan tunjang kepada dapatan SCIT yang dipersetujui oleh Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Terdapat kaedah berasingan di bawah ACP untuk mengira pendapatan dana hayat, kerana pendapatan itu telah diberikan kadar cukai konsesi sebanyak 8%. Kaedah pengiraan untuk pendapatan bercukai dana hayat adalah di bawah s 60AB dan 60(3) ACP dan bukan ss 5, 43 dan 44. Di bawah prinsip *generallibus specialia derogant*, di mana terdapat dua peruntukan undang-undang bertulis dalam yang mana satu am dan satu lagi khusus, peruntukan khusus mengatasi atau mengecualikan pemakaian peruntukan am. Oleh itu, Mahkamah Tinggi tersilap bersetuju dengan SCIT kerana ia akan mengakibatkan pendapatan dana hayat diagregatkan dengan Dana lain dan, oleh itu, tidak dapat memanfaatkan kadar cukai konsesi sebanyak 8%. Selain itu, Mahkamah Tinggi tersalah arah dalam undang-undang apabila ia gagal mengiktiraf bahawa pendapatan dana hayat mesti diasingkan secara nyata daripada pendapatan dana lain untuk menikmati kadar cukai keutamaan. Oleh itu, s 44(2) ACP tidak seharusnya terpakai untuk menolak kerugian daripada dana pemegang saham terhadap dana hayat, kerana ianya bukan sebahagian daripada pendapatan agregat perayu (lihat perenggan 32–33).

(2) Pendapatan agregat dana am dan pemegang saham hendaklah tertakluk kepada kadar cukai biasa sebanyak 28%. Oleh itu, adalah wajar bagi perayu untuk mengagregat dan menolak kerugian dana pemegang saham terhadap dana am di bawah peruntukan ss 43 dan 44(2) ACP. Walaupun Mahkamah Tinggi bersetuju dengan SCIT bahawa kerugian perayu boleh ditolak daripada pendapatan agregatnya, ia menjadi kesilapan dengan membuat kesimpulan bahawa pendapatan daripada dana pemegang saham tidak boleh diagregatkan dengan dana am. Dana hayat

tidak boleh menjadi sebahagian daripada pendapatan agregat. Mahkamah Tinggi, dalam bersetuju dengan keputusan SCIT, terkhilaf apabila gagal mempertimbangkan tujuan dan implikasi ss 60AB dan 60(3) ACP. Kedua-dua seksyen ini digubal untuk memberikan kadar cukai keutamaan ke atas pendapatan dana hayat, yang berulang pada kadar konsesi 8% berbanding 28% ke atas pendapatan dana lain. Kaedah cukai berasingan telah diwujudkan untuk dana hayat di bawah ACP, selaras dengan pengasingan berkanun dana hayat daripada aset syarikat insurans di bawah Akta Insurans 1996 ('IA') (lihat perenggan 36 & 38).

(3) Di bawah peraturan 12 Peraturan Insurans 1996 ('IR'), penanggung insurans hendaklah memulihkan apa-apa defisit dalam dana hayat dengan memindahkan sebarang amaun daripada dana pemegang sahamnya. Sebarang lebihan aset berbanding liabiliti dana insurans hayat, walau bagaimanapun, hanya boleh diperuntukkan melalui bonus kepada polisi penyertaan atau dipindahkan kepada dana pemegang saham atas penilaian aktuari dan syor aktuari yang dilantik. Perayu tidak boleh memindahkan apa-apa lebihan dana daripada dana hayatnya kepada dana pemegang sahamnya melainkan ia telah mendapat syor aktuari yang dilantik seperti yang dinyatakan di bawah s 43(2) IA, kerana dana itu dianggap dipegang atas amanah bagi pemegang polisi dan bukan milik perayu (lihat perenggan 41–42).

(4) Pendapatan daripada dana hayat dijalankan secara berbeza daripada pendapatan dana lain penanggung insurans, kerana syarat untuk perayu mengeluarkan apa-apa lebihan daripada dana amnya dan memindahkannya kepada dana pemegang sahamnya adalah kurang ketat berbanding syarat untuk sebarang pengeluaran daripada dana hayatnya. Dana dalam dana hayat perayu bukan milik perayu sehingga dan melainkan keperluan ketat di bawah s 43(2)(b) IA dipenuhi, yang dalam kes perayu tidak. Dana dalam dana hayat kekal di sana untuk manfaat pemegang polisi dan tidak boleh dianggap sebagai pendapatan perayu. Oleh itu, adalah tersilap bagi SCIT untuk memutuskan bahawa kerugian perayu dalam dana pemegang sahamnya harus ditolak dengan dana hayat sahaja tanpa perayu memenuhi keperluan ketat di bawah s 43(2)(b) IA. Mahkamah Tinggi melakukan kesilapan asas undang-undang dalam bersetuju dengan SCIT mengenai isu ini dan membuat kesimpulan bahawa perayu tidak akan mengabaikan peruntukan IA dengan mematuhi peruntukan ACP (lihat perenggan 43–45).

(5) Mahkamah Tinggi tersilap mengarahkan dirinya dalam undang-undang dengan memutuskan bahawa tanggungjawab perayu di bawah IA tidak seharusnya diambil kira dan ia hanya perlu mengambil berat dengan ACP mengenai perkara percukaian (perenggan 59(b) penghakiman). Ia gagal untuk mempertimbangkan bahawa perayu akan melakukan kesalahan di bawah IA 1996 dan boleh didenda atau berdepan penjara.

ITA dan IA mesti dibaca secara harmoni dan ditafsirkan secara bertujuan berdasarkan tujuan ia dicipta. Parlimen tidak boleh berhasrat penanggung insurans menganggap pendapatan daripada dana hayat mereka sebagai milik mereka, terutamanya apabila pendapatan hanya tertakluk kepada kadar cukai konsesi sebanyak 8%. Hasrat asas adalah untuk menggalakkan syarikat insurans mengurangkan premium insurans hayat untuk manfaat pemegang polisi; oleh itu, langkah pengawalseliaan yang ketat telah dilaksanakan untuk pendapatan dana hayat (lihat perenggan 48).

(6) Mahkamah Tinggi secara nyata silap apabila ia gagal mendapati bahawa SCIT telah salah arah dalam undang-undang dalam mentafsir ACP dan IA. Mahkamah Tinggi juga tersilap dengan bersetuju dengan pendirian SCIT bahawa tanggungjawab perayu di bawah IA adalah tidak material dan bahawa kerugian perayu harus ditolak dengan dana hayat perayu hanya untuk mencapai pendapatan bercukainya (lihat perenggan 53).]

Cases referred to

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (refd)

Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 4 MLJ 487; [2015] 5 CLJ 923, CA (refd)

Lim Moon Heng v The Government of Malaysia & Anor [2002] 2 MLJ 499; [2002] 2 CLJ 659, HC (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 540, SC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)

Mamor Sdn Bhd v Director-General of Inland Revenue [1981] 1 MLJ 117; [1979] CLJU 145 (refd)

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721; [2020] 7 CLJ 561, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967)

Insurance Act 1996 (repealed by Financial Services Act 2013) ss 38, 42, 43, 43(1), (2), (2)(b), 83(1), 203

Income Tax Act 1967 ss 5, 5(1), 13(2), 42, 43, 43(1), 44, 44(2), 60(2), (2)(a), (2)(c), (3), (4B), (10A), 60AB, 113(2)

Insurance Regulations 1996 reg 12

Appeal from: *AmLife Insurance Bhd lwn Ketua Pengarah Hasil Dalam Negeri* [2018] 7 MLJ 120 (High Court, Kuala Lumpur)

Nitin Nadkarni (with Ivy Ling Yieng Ping, Jay Fong Jia Sheng and Ng Jack Ming) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Ashrina bt Ramzan (with Athari Faris bin Hussein) (Inland Revenue Board of Malaysia) for the respondent.

Mohamed Zaini JCA:

INTRODUCTION

[1] The appellant's appeal pertains to the Notices of Additional Assessment dated 30 July 2009 issued by the respondent for the Years of Assessment 2003, 2004 and 2005. These notices arose out of an audit conducted by the respondent in 2008, where the respondent discovered that the appellant had:

(a) claimed deduction on the expenses incurred in purchasing signboards in 2004 and 2005; and

(b) set off the current year's losses of its shareholders' fund from the general fund.

[2] The respondent found these to be irregular and took the following action:

(a) disallowed the deduction of the expenses for the signboards and taxed the amount deducted;

(b) set off the current year losses in the shareholders fund from the aggregate income of the appellant's life fund and general fund; and

(c) imposed a penalty on the appellant on the additional tax assessed.

[3] The dissatisfied appellant appealed against the respondent's decision to the Special Commissioners of Income Tax ('SCIT') through a case stated.

[4] The SCIT decided in favour of the respondent regarding the signboards. The SCIT opined that the expenses in purchasing the signboards for its agents must be regarded as a capital expenditure, not revenue expenditure, as the signboards were assets or advantages to benefit the appellant's trade.

[5] As for the treatment of the losses in the shareholders fund, the SCIT disagreed with the views of both parties and decided that the losses should be set off against the appellant's life fund. Regarding the penalties imposed, the SCIT maintained the penalty imposed on the signboard expenditure but disallowed the penalty imposed on the treatment of the losses in the appellant's shareholders fund, as it was of the view that even the respondent did not make the correct finding.

[6] The appellant, dissatisfied with the SCIT's decision, appealed to the High Court. The High Court concurred with the SCIT's findings and dismissed the appellant's appeal.

[7] The appellant had initially canvassed the following three issues for this appeal:

(i) the signboard expenses;

(ii) the treatment of the shareholders' fund's losses; and

(iii) the penalties.

The appellant, however, elected to pursue issue: (ii) only in this appeal. The respondent did not appeal against the SCIT or the High Court's decision on issues (i) and (iii). This judgment will, therefore, concerns issue (ii) only.

BACKGROUND

The respondent's audit

[8] The appellant sold general and life insurance before 2009. It confined its business to life insurance under a restructuring exercise in 2009. The appellant had, before the restructuring, transferred:

(a) RM2,050,325 for the year of assessment ('YA') 2003; and

(b) RM5m for the YA 2004,

from its shareholders' fund to its life fund to ensure that the latter was sufficiently solvent to meet its liabilities to policyholders. The appellant contended that this was in line with the requirement under reg 12 of the Insurance Regulations 1996 ('the IR 1996'), which requires the appellant to make good any deficit in its life fund by transferring money from the shareholders' fund. Regulation 12 is as follows:

> 12(1) Where a life insurance fund is determined to be in deficit by an actuarial valuation as at the end of a financial year, the licensed life insurer shall apply any amount determined as transferable to the shareholders' fund under regulation 10 or 11 from another life insurance fund, to make good the deficit.
>
> (2) A licensed life insurer shall immediately make good any deficit subsisting after the application under subregulation (1) by a transfer from the shareholders' fund into the life insurance fund in compliance with subsection 41(1) of the Act.

[9] Arising from these transfers, the appellant's shareholders' fund suffered losses of:

(a) RM1,741,492 for YA 2003; and

(b) RM4,799,307 for YA 2004.

[10] To address these losses, the appellant set off the losses from the surplus income of its general fund. The appellant's method did not find favour with the respondent when it audited the appellant in 2008. The respondent took the position that the appellant should have offset the losses in its shareholders fund against the income of both the general and life fund combined and not just from the general fund.

[11] The respondent then set off the appellant's shareholders' fund's current year losses from the combined income of the general fund and life fund and apportioned the income back to the respective funds. The chargeable income from the appellant's shareholders' fund, general fund and other sources of income were subjected to the standard tax rate of 28%. In contrast, the chargeable income from the life fund is subjected to a concessionary tax rate of only 8%. These tax rates are a primary factor for the appellant and shall be elaborated further later.

[12] The respondent then issued notices of additional assessment for YA 2003 to 2005 with penalties under s 13(2) of the Income Tax Act 1967 ('the ITA 1967'). The appellant was dissatisfied with the respondent's decision and appealed to the SCIT.

The case before the SCIT

[13] The issue posed to the SCIT was whether the appellant's decision in setting off the current year losses in the shareholders' fund against the income from the general fund is correct in law. The appellant submitted to the SCIT that the losses in the shareholders' fund should only be deducted from the general fund, as the funds in the life fund are held in trust for the policyholders under the Insurance Act 1996 ('the IA 1996'), and can only be withdrawn following the strict procedures set out in the Act. The appellant also contended that its life fund's income should not be aggregated with the income of its other funds as the ITA 1967 had special provisions for it.

[14] The SCIT concluded that both the appellant and respondent's interpretation of the provisions in the ITA 1967 on the tax treatment of the appellant's losses in the shareholder's funds were erroneous. The SCIT opined that there are only two business categories, namely life and general insurance, under s 60(2)(a) of the ITA 1967, which states as follows:

60 Insurance business

(1) ...

(2) For the purposes of this section —

A (a) subject to paragraph (b), where an insurer carries on life business in conjunction with general business, *the life and general business shall be treated as separate insurance business*: (Emphasis added.)

B **[15]** The SCIT took the view that life insurance and general insurance are separate businesses with their own source of income and that the concept of a shareholders fund is only found in the life insurance business. The SCIT concluded that the appellant's losses from the shareholders' fund should, therefore, be set off against the life fund as both funds come under the life insurance business, and that the general fund comes under a separate category C of general insurance business.

[16] The SCIT was also of the view that the appellant's responsibilities under the IA 1996 should not interfere with the application of the ITA 1967 as the D two laws have distinct applications.

[17] As for the penalty imposed by the respondent under s 113(2) of the ITA 1967, the SCIT set aside this penalty as even the respondent did not make the correct computation.

E

[18] The appellant appealed to the High Court against the SCIT's decision.

The High Court's findings

F **[19]** The High Court agreed with the SCIT's findings as it concluded that the SCIT had carefully examined the facts of the case and found no error in the computation as it was based on the relevant provisions of the ITA 1967. The High Court concurred with the SCIT's decision that the appellant's losses from G the shareholders' fund should only be set off against the life fund and not the general fund, in consonant with s 60(2) of the ITA 1967. The High Court's findings were set out in paras 61 and 62 of the judgment, which reads as follows:

H [61] It was the SCIT's finding that life insurance business and General Insurance Business were two separate businesses and generates two sources of income. This finding is supported by sub-s 60(2) of ITA which read as follows:

...

Therefore, it should be treated separately for the purpose of s 60(10A) of ITA.

I [62] It is my considered view that the fact (sic) in this case was carefully examined by the SCIT in determining the correct method of computation in setting off the current year losses as stated in para 34–50 at pp 42–53 of the case stated. I find no error in the computation as it is based on the relevant provisions of the ITA.

[20] There seems, however, to be an inconsistency in the High Court's decision, as it had in the preceding paragraph, namely para 59(a) of the judgment, held that the respondent's approach was correct:

> [59] Based on the above, I am in agreement with the Respondent (sic) *submission that:*
>
> (a) the Respondent's tax treatment with regards to the losses for the shareholders' fund is due and proper under subsection 44(2) of the ITA. For the Appellant to say that the Respondent has no legal or factual basis to apportion the losses from the shareholders' fund to the life insurance funds and the general insurance does not hold water. It could be that the Appellant disagrees with such treatment as the tax rate imposed on the life insurance business, at 8%, the general insurance business and the shareholder fund, at 28 (%), is different;

[21] This finding would seem to contradict the SCIT's decision. On reflection, the High Court should have allowed the appellant's appeal in part and permitted the appellant to set off the losses against the general fund too. The respondent, however, did not appeal against the High Court's decision on this issue and the setting aside of the penalty.

THE APPEAL

[22] There seem to be three positions taken on the treatment of the losses in the shareholders fund arising from the appellant, respondent and SCIT/High Court's approaches, which are summarised as follows:

(a) appellant's position: the losses should be set off against the income from the general fund only;

(b) respondent's position: the losses should be set off against both the General and life funds; and

(c) SCIT's position (affirmed by the High Court): the losses should be set off against the life fund only.

[23] In gist, the appellant and respondent agree that the funds in the general fund can be used to offset the shareholders fund losses. That is the only common ground, as the respondent takes the position that the funds from the life fund should be combined with the general fund to offset the losses in the shareholders fund. The SCIT, on the other hand, held that only funds from the life fund should be utilised to offset the losses in the shareholders fund. The SCIT and the respondent share common ground on this issue in that both take the position that the life fund can be used to offset the losses in the shareholders' fund.

[24] The only live issue in this appeal is whether the appellant should offset its losses from the life funds only, as it is common ground between the appellant and the respondent that the losses can be set off against the general fund.

[25] The SCIT and the High Court, in deciding that the appellant should set off the losses from the life fund, took the view that the income of the life fund formed part of the aggregate income of the appellant within the meaning of s 44(2) of the ITA 1967. The crucial issue, therefore, is whether the income of the life fund should be treated as part of the appellant's aggregate income under s 44(2) of the ITA 1967, as that was the fulcrum of the SCIT's findings that the High Court concurred with.

FINDINGS

Chargeable income

[26] It is necessary at the outset to determine the method for calculating the chargeable income under the ITA 1967. The computation of a chargeable income is set out under s 5 of the ITA 1967. Section 5(1) states as follows:

> 5 Manner in which chargeable income is to be ascertained
>
> (1) Subject to this Act, the chargeable income of a person upon which tax is chargeable for a year of assessment shall be ascertained in the following manner —
>
> (a) first, the basis period for each of his sources for that year shall be ascertained in accordance with Chapter 2 of Part III;
>
> (b) next, his gross income from each source for the basis period for that year shall be ascertained in accordance with Chapter 3 of that Part;
>
> (c) next, his adjusted income from each source (or, in the case of a source consisting of a business, his adjusted income or adjusted loss from that source) for the basis period for that year shall be ascertained in accordance with Chapter 4 of that Part;
>
> (d) next, his statutory income from each source for that year shall be ascertained in accordance with Chapter 5 of that Part;
>
> (e) next, his aggregate income for that year and his total income for that year shall be ascertained in accordance with Chapter 6 of that Part; and
>
> (f) next, his chargeable income for that year shall be ascertained in accordance with Chapter 7 of that Part.

[27] Under s 43(1) of the ITA 1967, the statutory income from all sources of income is added to arrive at the aggregate income. The current year's losses can then be deducted against the aggregated income to arrive at the total income; s 44(2) of the ITA 1967. These two sections are as follows:

43 Aggregate Income

(1) Subject to this Act, the aggregate income of a person for a year of assessment (that person and year of assessment being in this section referred to as the relevant person and the relevant year respectively) shall consist of —

(a) the aggregate of his statutory income, if any, for the relevant year from each of his sources consisting of a business, reduced by any deduction falling to be made for the relevant year pursuant to subsection (2);

(b) the aggregate of his statutory income, if any, for the relevant year from each of his other sources; and

(c) any additions falling to be made for the relevant year pursuant to Schedule 4.

44 Total Income

(1) ...

(2) Subject to subsections (3) and (5), *there shall be deducted pursuant to this subsection from the aggregate income* of the relevant person for the relevant year *the amount of any adjusted loss* from a source of his for the basis period for the relevant year or, where there is an adjusted loss from each of two or more sources of his for the appropriate basis period for each source for the relevant year, the aggregate of the adjusted loss from each of those sources for its appropriate basis period for the relevant year. (Emphasis added.)

Whether the life fund is part of the aggregate income

[28] The pertinent issue is whether the life fund is part of the appellant's aggregate income under ss 5, 43 and 44 ITA 1967. Both the SCIT and High Court took the position that the life fund and the shareholders' fund are part of the same business, namely the life insurance business and that the general fund is a separate business coming under the general insurance business. The respondent, on the other hand, is of the view that the aggregate income consists of the Life, Shareholders and general funds.

[29] Sections 43 and 44 of the Act are of a general application. Under s 60(2)(a) of the ITA 1967, life and general insurance are categorised as separate businesses. More importantly, under s 60(2)(c), the income from the life fund is treated as a separate source of income from the shareholders fund:

60 Insurance Business

(2) For the purposes of this section —

(a) subject to paragraph (b), where an insurer carries on life business in conjunction with general business, the *life business and the general business shall be treated as separate insurance business;*

(b) ...

(c) where an insurer carries on life business, the *income of the life fund shall be treated as a separate source of income from the income of the shareholders' fund* in respect of the life business; (Emphasis added.)

[30] The tax rates on the income from life funds are remarkably lower than the other funds. It enjoys a concessionary rate of 8% compared to the 28% imposed on the general and shareholders' funds. The concession given by the government is to encourage insurance companies to lower their premium for life insurance policyholders, which benefits them. The Income Tax Act was amended in 1994 in line with the government's intention, where s 60AB of the ITA 1967 was added for the specific concessionary tax rate on the income of life funds. The section reads as follows:

60AB Chargeable income of life fund subject to tax

The chargeable income in respect of the life fund *as determined under subsections 60(3)* and 60(4) is subject to tax as specified under Part VIII of Schedule 1.

PART VIII

Notwithstanding Part I and Part II, income tax shall be charged on the chargeable income of a life fund, other than income arising from life re-insurance business of a resident or non-resident insurer at the rate of *8 per cent.* (Emphasis added.)

[31] Under s 60AB of theITA 1967, the chargeable income of a life fund is determined under s 60(3):

60 Insurance business

(1) ...

(2) ...

(3) The adjusted income of the life fund other than income arising from life re-insurance business, for the basis period for a year of assessment of an insurer resident for the basis year for that year of assessment shall be ascertained by —

(a) taking the aggregate of —

(i) the amount of gross income for that period from the investments made out of any of the insurer's life funds; and

(ii) the amount of any gross proceeds (whether or not of an income nature) which are not gross income to which subparagraph (i) applies and which are first receivable in that period in connection with the realisation of those investments or any rights arising from them; and

(b) deducting from that aggregate where subparagraph (a)(ii) is applicable for that period to gross proceeds receivable in connection with any investments or rights, the cost of acquiring and realising those investments or rights.

[32] It is clear that there is a separate method under the ITA 1967 to calculate the income of a life fund, for the income is accorded a concessionary tax rate of 8%. The calculation method for the taxable income of life funds comes under ss 60AB and 60(3) of the ITA 1967 and not ss 5, 43 and 44. Under the principle of *generallibus specialia derogant,* where there are two provisions of written law in which one is general and the other specific, the specific provision overrides or excludes the application of the general provision. This principle was enunciated by the appellate court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520 (CA), where it was held:

> ... It lies in the rule of construction expressed in the maxim generalibus specialia derogant. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision. (p 550)

[33] The High Court, with respect, fell into error in agreeing with the SCIT as it would result in the life fund's income being aggregated with the other funds and, therefore, not being able to take advantage of the concessionary tax rate of 8%. In our view, the High Court misdirected itself in law when it failed to recognise that the income of a life fund must be expressly separated from the income of the other funds to enjoy the preferential tax rate. Therefore, s 44(2) of the ITA 1967 should not be relied on to set off the losses from the shareholders' fund against the life fund, for the latter is not part of the appellant's aggregate income.

[34] It was not wrong for the respondent to set off the losses of the shareholders' fund from the general fund as there are no provisions in the ITA 1967 which support the respondent's contention that the current year's losses from the shareholders fund are to be set off against both the general fund and life fund. Section 60AB, read with s 60(3), creates a separate scheme for life fund profits that excludes ss 5(1) and 44(2).

[35] The correct method to determine the taxable income of the shareholders' fund and the general funds under the ITA 1967 should be as follows:

(a) statutory income: s 42 for general fund and s 60(4B) for the shareholders fund;

(b) s 43 — income of the general and shareholders' funds;

(c) aggregate income: set off against current year losses to get the total income (s 44(2)); and

(d) chargeable income (tax rate of 28%).

[36] The aggregated income of the general and shareholders' fund would then be subjected to the regular tax rate of 28%. Therefore, It was right for the appellant to aggregate and set off the shareholders fund's losses against the general fund under the provisions of ss 43 and 44(2) of the ITA 1967. Although the High Court agreed with the SCIT that the appellant's losses could be deducted from its aggregate income, it fell into error by concluding that the income from the shareholders fund could not be aggregated with the general fund.

[37] The appropriate method to determine the taxable income of the life fund under ITA 1967 should be as follows:

(a) the aggregate of the gross income and gross proceeds and deducting the costs of acquiring the investments (s 60(3));

(b) adjusted income (s 60AB); and

(c) chargeable income (tax rate of 8%).

[38] The life fund cannot be part of the aggregate income. The High Court, in agreeing with the SCIT's decision, erred when it failed to consider the purpose and implications of ss 60AB and 60(3) of the ITA 1967. These two sections were enacted to give a preferential tax rate on the income of a life fund, which bears repeating at a concessionary rate of 8% as opposed to 28% on the income of the other funds. A separate tax treatment is created for life funds under the ITA 1967, consistent with the statutory segregation of life funds from the insurance companies' assets under the IA 1996.

The provisions in the IA and IR 1996

[39] The IA 1996 and its Regulations regulate the insurance industry and business. Any violations of the Act and its Regulations are deemed offences and punishable with imprisonment, hefty fines or both. Section 203 of the IA 1996 states as follows:

> 203 General penalty
>
> (1) A person who —
>
> (a) contravenes or fails to comply with a provision of this Act; or
>
> (b) fails to comply with a requirement notice, order or direction issued by the Minister or by the Bank under this Act or a regulation made under this Act,
>
> commits an offence and, where no penalty is expressly provided, is liable on conviction to a fine of five hundred thousand ringgit or to imprisonment for a term of six months or to both.

[40] Section 38 of the IA 1996 makes it mandatory for insurers to establish and maintain a separate insurance fund for each class of insurance. Section 42 of the IA 1996 also stipulates that the insurer's assets must be kept separate from its insurance fund.

[41] Under reg 12 of the IR 1996 (as stated earlier), the insurer shall make good any deficit in the life fund by transferring any amount from its shareholders fund. Any surplus of assets over liabilities of a life insurance fund, however, can only be allocated by way of bonus to participating policies or transferred to the shareholders fund upon an actuarial valuation and recommendation of the appointed actuary. This is set out under s 43(2) of the IA 1996:

> 43 Withdrawal from insurance fund
>
> (1) ...
>
> (2) *Where upon an actuarial valuation of a life insurance fund, there is a surplus of assets over liabilities in the life insurance fund at the end of a financial year, the licensed life insurer, on the recommendation of the appointed actuary, may allocate a part of the surplus attributable to participating and non-participating policies —*
>
> (a) *by way of bonus to participating policies; and*
>
> (b) *for transfer out of the life insurance fund to the shareholders' fund*,
>
> subject to such limits and such proportions as may be prescribed. (Emphasis added.)

The actuary appointed must be approved by Bank Negara: s 83(1) of the IA 1996.

[42] The first point to note is that the appellant cannot transfer any surplus funds from its life fund to its shareholders fund unless it has obtained the appointed actuary's recommendation as set out under s 43(2) of the IA 1996, as the funds are deemed to be held on trust for the policyholders and do not belong to the appellant. This is in contrast to the withdrawal of any surplus funds from its general funds, where s 43(1) of the IA 1996 stipulates that its withdrawal is only subjected to the terms of its contract with the policyholders and constituent documents:

> 43 Withdrawal from insurance fund
>
> (1) Where there is a surplus of assets over liabilities in a general insurance fund at the end of a financial year, the licensed general insurer may withdraw the surplus subject to —
>
> (a) any instrument or contract binding the licensed general insurer; or
>
> (b) its constituent documents.

[43] In the upshot, it is clear that the income from a life fund is treated differently from the incomes of an insurer's other funds, as the conditions for the appellant to withdraw any surplus from its general funds and transfer it to its shareholders fund are less stringent than those for any withdrawal from its life fund.

[44] The funds in the appellant's life fund do not belong to the appellant until and unless the stringent requirements under s 43(2)(b) of the IA IA 1996 are met, which in the appellant's case were not. The funds in the life fund remain there for the benefit of the policyholders and could not be deemed to be the appellant's income.

[45] It is, therefore, erroneous for the SCIT to rule that the appellant's losses in its shareholders' fund should be set off against the life fund only without the appellant fulfilling the strict requirements under s 43(2)(b) of the IA IA 1996. The High Court committed a fundamental error of law in agreeing with the SCIT on this issue and concluding that the appellant would not be disregarding the provisions of the IA 1996 by complying with the provisions of the ITA 1967.

[46] The case of *Lim Moon Heng v The Government of Malaysia & Anor* [2002] 2 MLJ 499; [2002] 2 CLJ 659 (HC) cited by the High Court does not support this proposition. The case concerns a bankrupt who was barred from travelling overseas by the Inland Revenue Board ('IRB') as he had tax dues even though the official assignee ('OA') had granted him leave. The bankrupt took the stand that the IRB had no authority to restrict his travels and that only the OA had authority over him as a bankrupt under the Bankruptcy Act 1967. The High Court held that the Bankruptcy Act and the powers conferred to the official assignee under it apply to a bankrupt who does not owe the IRB any tax, and that as the bankrupt still owes tax to the IRB, the Director General of IRB still retains power under the ITA 1967 to bar him from travelling. The court went on to state that a bankrupt person who has settled his taxes and was granted leave by the IRB to travel could still be barred by the OA from travelling if he still owes another claimant.

[47] The appellant here could not fulfil the requirements set by the respondent under the ITA 1967 without breaching the IA 1996 and suffering penal consequences. The appellant and any insurance company would commit an offence if they failed to abide by s 43(2)(b) of the IA 1996 requirements.

[48] The High Court, therefore, misdirected itself in law by holding that the appellant's responsibilities under the IA 1996 should not come into consideration and that it should only be concerned with the ITA 1967 on taxation matters (para 59(b) of the judgment). It failed to consider that the

appellant would be committing an offence under the IA 1996 and liable to be fined or face imprisonment. The ITA 1967 and IA 1996 must be read harmoniously and interpreted purposively based on the purposes for which they were created. The purposive and harmonious approach was adopted by the Federal Court in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561. Parliament could not have intended insurers to treat the income from their life funds as their own, particularly when the income is only subjected to the concessionary tax rate of 8%. The underlying intention was to encourage insurance companies to reduce the premium for life insurance for the benefit of policyholders; hence, strict regulatory measures were put in place for the income of life funds.

CONCLUSION

[49] We are mindful that an appellate court would be slow to intervene findings of facts made by the SCIT and the High Court unless it can be shown that they had erred on a question of law; *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 (PC) and *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 540 (SC).

[50] The courts are generally slow to interfere with the findings of facts made by the SCIT as the latter specialises in tax matters and practises of the business community and has '... special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts' (per Abdul Wahab Patail JCA in *Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2015] 4 MLJ 487; [2015] 5 CLJ 923 (CA)).

[51] The court may review the decision of the SCIT if the latter:

(a) misdirected themselves on the law; or

(b) answer the wrong question; or

(c) omit to answer a question which they ought to have answered; or

(d) considered factors which are not supported by the evidence before them; or

(e) reached a conclusion on facts which are not supported by the evidence before them; or

(f) made a finding of fact which no reasonable person in the circumstances would have arrived at.

(See *Mamor Sdn Bhd v Director-General of Inland Revenue* [1981] 1 MLJ

A 117; [1979] CLJU 145 (HC).)

[52] It is, therefore, trite that the courts should only intervene if it is shown that the SCIT erred on a question of law, resulting in a manifest error in the deciding order. Otherwise, it would amount to interference contrary to the
B intent of the legislation in setting up and empowering the SCIT: *Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri*.

[53] The High Court was plainly wrong when it failed to find that the SCIT had misdirected itself in law in interpreting the ITA 1967 and IA 1996. The
C High Court also fell into error by agreeing with the SCIT's stand that the appellant's responsibilities under the IA 1996 are not material and that the appellant's losses should be set off against the appellant's life funds only to arrive at its chargeable income.

D **[54]** The appellant's appeal is therefore allowed with costs of RM20,000 here and below. The order of the High Court is to that extent set aside.

Appeal allowed.

E Reported by K Selvaraju

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